

1 WO

2  
3  
4  
5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF ARIZONA  
7

8 UNITED STATES OF AMERICA, )

9 Plaintiff, )

10 v. )

11 NICOLETTE RENEE FLETCHER, )

12 Defendant. )  
13 \_\_\_\_\_ )

No. 06 MJ 4314 PCT MEA

ORDER

14 Before the Court are Defendant's Ex Parte Application  
15 seeking a Rule 17(c) subpoena duces tecum, Defendant's Motion to  
16 Seal, and Defendant's Withdrawal of Ex Parte Application for  
17 subpoena.

18 **Procedural History**

19 On October 2, 2006, a criminal complaint was issued  
20 charging Defendant and two co-defendants with Assault with a  
21 Dangerous Weapon in Indian Country in violation of 18 U.S.C. §§  
22 113(a)(3) and 1153. Defendant received an initial appearance  
23 and was appointed counsel, i.e., Defendant is represented by the  
24 Federal Public Defender. On October 4, 2006, a preliminary  
25 hearing and detention hearing were held in Flagstaff, Arizona.  
26 At the hearing, upon Defendant's waiver of the preliminary  
27 hearing, the Court found probable cause to support the charge  
28 against Defendant and Defendant was bound over pending further

1 proceedings before the grand jury.

2           The Court ordered Defendant released from custody, with  
3 certain conditions placed on her release. The matter remains on  
4 this Court's docket, however, no proceedings are scheduled  
5 before the Court in Flagstaff, nor before any other judge in the  
6 District. As of this date, the case is awaiting action by the  
7 grand jury.

8           Between October 13, 2006 and October 17, 2006,  
9 Defendant's counsel in Phoenix submitted to the duty Magistrate  
10 Judge in Phoenix a request for a subpoena pursuant to Rule  
11 17(c), Federal Rules of Civil Procedure. The subpoena was  
12 directed to a third-party not a party to this litigation. The  
13 proposed subpoena indicated the evidence to be subpoenaed would  
14 be produced to the duty Magistrate Judge's chambers in Phoenix  
15 on November 13, 2006. No motion accompanied the proposed  
16 subpoena but a form affidavit of indigency and order were  
17 attached.

18           As this case was and still is on this Court's docket,  
19 the request for the subpoena was forwarded to this Court by the  
20 duty Magistrate Judge. On October 19, 2006, this Court set a  
21 hearing on the request for the subpoena for October 25, 2006,  
22 and notified the parties of the hearing. Late on October 20,  
23 2006, the Court received defendant's Ex Parte Application and  
24 Motion to Seal.

25           Shortly before the hearing on October 24, 2006, the  
26 Court received Defendant's request to withdraw the Ex Parte  
27 Application and Motion to Seal. On October 24, 2006, a hearing  
28 was conducted with regard to the request for the subpoena, at

1 which hearing Defendant's counsel and government counsel were  
2 present. As of the date and time of that hearing and in fact  
3 through this date there has been no action by the Grand Jury.  
4 The Court ruled from the bench. This order follows.

#### 5 **Analysis**

6 Rule 17(c), Federal Rules of Criminal Procedure,  
7 governs the issuance of subpoenas for production of documents  
8 and other items in criminal cases. The rule may only be used to  
9 obtain materials which would be admissible as evidence in a  
10 criminal proceeding. See Bowman Dairy Co. v. United States, 341  
11 U.S. 214, 221 (1951); United States v. Cuthbertson, 651 F.2d  
12 189, 195 (3d Cir. 1981); United States v. Murray, 297 F.2d 812,  
13 821 (2d Cir. 1962). Subpoenas issued pursuant to Rule 17(c) are  
14 not discovery devices and may not be used to expand the scope of  
15 Rule 16, Federal Rules of Criminal Procedure. See United States  
16 v. Brooks, 966 F.2d 1500, 1505 (D.C. Cir. 1992); United States  
17 v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980); United States  
18 v. Cherry, 876 F. Supp. 547, 552 (S.D.N.Y. 1995).

19 A party seeking production of documents or other  
20 materials pursuant to Rule 17(c) must show that the materials  
21 are (1) relevant, (2) admissible as evidence, and (3)  
22 specifically identified. See, e.g., United States v. Nixon, 418  
23 U.S. 683, 700 (1974); United States v. Morris, 287 F.3d 985, 991  
24 (10th Cir. 2002). It is fundamental that there must be a  
25 proceeding pending before the Court to which the subpoenaed  
26 material relate before the subpoena may issue. See United  
27 States v. Etimani, 328 F.3d 493, 501 (9th Cir. 2003); United  
28 States v. Keen, 509 F.2d 1273, 2374-75 (6th Cir. 1975); United

1 States v. Smyth, 104 F. Supp. 279, 282 (N.D. Cal. 1952); United  
2 States v. Flynn, 103 F. Supp. 925, 931 (S.D.N.Y. 1951).


3           As noted supra, there are no proceedings scheduled  
4 before this Court, nor any other court, as the grand jury has  
5 not acted regarding the charges against Defendant. After  
6 reviewing the proposed subpoena and accompanying motion, the  
7 Court concludes the subpoena is intended as a discovery device.  
8 Additionally, the proffered subpoena appears to have been a  
9 photocopy upon which the necessary information was typed, not an  
10 original subpoena issued by the Clerk of the Court and under  
11 seal of the Court as required by Rule 17(a), Federal Rules of  
12 Criminal Procedure.

13           **THEREFORE, IT IS ORDERED that** Defendant's Ex Parte  
14 Application for subpoena duces tecum pursuant to Rule 17(c) is  
15 **denied without prejudice.** Should the Defendant's prosecution  
16 proceed and hearings or a trial be set before this or another  
17 Court to which a proper Rule 17(c) subpoena request would  
18 relate, Defendant may seek to reapply Ex Parte or otherwise for  
19 a subpoena duces tecum. Whether the subpoena will issue is a  
20 matter for the discretion of the Court reviewing it and whether  
21 the requirements of United States v. Nixon, 418 U.S. 683, 700  
22 (1974) are met by defendant.

23           **IT IS FURTHER ORDERED that** Defendant's Motion to Seal  
24 her Ex Parte Application for subpoena duces tecum is **granted.**  
25 The Clerk of the Court shall seal Defendant's Motion to Seal,  
26 Defendant's Application for subpoena duces tecum, Defendant's  
27 proposed Rule 17(c) subpoena, and Defendant's Affidavit of  
28 indigency.

IT IS FURTHER ORDERED that Defendant's request to withdraw her Ex Parte Application for a subpoena duces tecum is denied.

DATED this 25<sup>th</sup> day of October, 2006.

  
Mark E. Asper  
United States Magistrate Judge